

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22-11-2007

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

W.P.Nos.18813 and 19521 of 2007  
and

MP No.2/2007 in WP 18813/2007  
and

MP Nos.1 and 2/2007 in WP 19521/2007

P.K.Shefi

.. Petitioner in  
both petitions

vs

1.The Indian Railway Catering and  
Tourism Corporation Limited  
(A Government of India Enterprise)  
rep. By Executive Director (CS)  
9<sup>th</sup> Floor, Bank of Baroda Building  
No.16, Parliament Street  
New Delhi 110 001.

2.The Regional Director  
Indian Railway Catering and  
Tourism Corporation Ltd.,  
Zonal Office  
6-A, The Rain Tree Place  
No.9, Mc Nichols Road  
Chennai 600 031.

.. Respondents in  
both petitions

WP No.18813/2007 filed under Article 226 of the Constitution of India praying for a writ of certiorarified mandamus calling for the records of the first respondent herein relating to the Tender Notification published in the New Indian Express dated 21.5.2007 in respect of the license for setting up, operation and maintenance of Cell Kitchens (Base Kitchens) with eating facilities in respect of Madurai and Jolrpettai Railway Stations and quash the same in so far as it relates to Madurai and Jolarpettai Railway Stations and direct the respondents herein to forthwith grant final approval for the drawings submitted by the petitioner, so as to enable the petitioner to commence the construction and commissioning of the Cell Kitchens in Madurai and Jolarpettai Railway Stations.

WP No.19521/2007 filed under Article 226 of the Constitution of India praying for a writ of certiorari to call for the records of the first respondent herein relating to Letter No. 2006/IRCTC/CATC/CK/South Zone dated 1.6.2007 and quash the same.

For Petitioner : Mr.AR.L.Sundaresan  
Senior Counsel  
for M/s.AL.Ganthimathi  
For Respondents : Mr.A.Thiagarajan  
Senior Counsel  
for Mr.V.G.Sureshkumar

COMMON ORDER

When the matter is taken up for enquiry, the learned Counsel for the petitioner has made an endorsement that the writ petition in WP No.18313/2007 may be dismissed as infructuous. The same is recorded.

2.Challenging the cancellation of a tender made by the first respondent by its letter dated 1.6.2007, the petitioner tenderer has brought forth WP No.19521/2007 for a writ of certiorari.

3.The affidavit in support of the petition and the counter affidavits are perused. The Court heard the learned Senior Counsel on either side.

4.The first respondent Railway Company made publications calling for Two Packet Tenders for various locations under Phases I, II and III on 22.11.2006, in the newspapers which included Madurai Junction as one of the locations in Phase II under Scale-B, and the tender documents were made available for sale between 23.11.2006 and 6.12.2006. The last date of submission of the tender was 7.12.2006. As far as the second location namely Jolarpettai, was concerned, it was included in the said notification under Scale-C, Phase III. The tender documents were made available for sale, and the last date for submission of the tender was 8.12.2006. The cost of the tender documents was paid by the petitioner. By a letter dated 28.12.2006, the first respondent issued the tender documents to the petitioner for the said two locations. The petitioner submitted those tender documents containing technical bid and also the financial bid. After opening both, they are found to be satisfactory and were also accepted by the first respondent, pursuant to which the first respondent intimated to the petitioner by letters dated 3.1.2007 and 24.1.2007 respectively, about its acceptance and called upon him to pay the security deposit of Rs.43,000/- in respect of the Cell Kitchen at Madurai, and Rs.44,000/- in respect of the Cell Kitchen at Jolarpettai. The same was also complied with by the petitioner by accepting the terms and conditions of the license stipulated in the said letters, and the security deposits as demanded, were also paid on 4.1.2007 in respect of Madurai, and on 29.1.2007 in respect of Jolarpettai. Then, the petitioner was called upon to submit the preliminary plans, specifications and tentative schedule for commissioning of the Cell Kitchens for approval by the Indian Railway Catering and Tourism Corporation Limited (IRCTC). He submitted the same to the respondents on 20.1.2007 and 13.2.2007 for Madurai and Jolarpettai respectively.

5.The case of the petitioner is that in the plans submitted by him, the areas are shown as 3220 sq. ft. and 3037 sq. ft. respectively, for those two locations; that while the matter stood thus, there was no exception made by the Railway Company to the same as if there was any mistake to the extent of the area which was notified in the tender documents and which was actually the subject matter of the tender; that on the other hand, discussions were made, and they suggested certain modifications to the preliminary plans; that by letter dated 9.5.2007, the petitioner was called upon to submit modified drawings; that the modifications suggested by the first respondent, were only technical and in respect of all the Cell Kitchens; that there was absolutely no doubt in the mind of the respondents as to the area over which the Cell Kitchens were to be located; that the petitioner was fully aware of the same; that accordingly, the petitioner modified the structural drawings on 19.5.2007; and that the matter was pending in the hands of the respondents for approval.

6.It is the further case of the petitioner that at that juncture, a publication was made by the first respondent in the newspapers on 21.5.2007, inviting tenders for the Cell Kitchens for those two locations namely Madurai and Jolarpettai; that the petitioner filed WP 18313/2007 along with stay petition before this Court; that while that writ petition was pending before this Court, the first respondent by the impugned letter No.2006/IRCTC/CATG./CK/South Zone dated 1.6.2007, stating that there was a discrepancy in the extent notified in the bid document and the area actually available on ground as per the petitioner's plans, and further averred that it was a mistake in the bid document which was found out later and the minimum license fee was fixed for the area tendered as 573 Sq. Ft. and 1232 Sq. Ft. for Madurai and Jolarpettai Cell Kitchens respectively, and under the circumstances, the earlier tender was cancelled, and he has to get back the security deposit originally given by him, and hence, the instant writ petition in WP No.19521/2007 came to be filed before this Court.

7.Advancing the arguments on behalf of the petitioner, the learned Senior Counsel would submit that it is true that there was a tender, and documents were received by him; that actually the security deposits were also made; that following the same, two plans were actually prepared and placed before them, by which he has clearly indicated that the area that was actually understood between the parties at the time of entering into the agreement, was 3220 sq. ft. and 3037 sq. ft. for those two locations namely Madurai and Jolarpettai respectively; that once it was understood between the parties and also that was the consensus between them, there is no question of cancellation of the same that would arise; that even the impugned letter would read that there was a mutual mistake committed; but, there was no mutual mistake at all; that even if the area tendered by the petitioner, is to be taken as 573 and 1232 sq. ft. as per the drawings, the Cell Kitchens could not be located, and it is impossibility of performance; that what was understood between them, was actually 3220 sq. ft. and 3037 sq. ft.

respectively; that when the plans were actually placed, they were drawn as per the understanding between the parties; that in the instant case, the petitioner has actually accepted the original contract and it has also been acted upon; that it is also given implementation; that in this case, there is no question of cancellation of the agreement that would arise since the right has already accrued and it is also in favour of the petitioner; that further the document would go to show an area of 573 sq. ft. and 1232 sq. ft. for Madurai and Jolarpettai respectively; that the actual area on ground was known to both the parties as the area marked and identified; that a reading of the letter would clearly reveal that there was a mutual mistake; but, that is not so; that what was understood was 3220 sq. ft. and 3037 sq. ft.; and that now, calling it as mutual mistake is only an after thought in order to cancel the same.

8.The learned Senior Counsel took the Court to the plans that were placed, and all the communications addressed, which would clearly indicate that the original understanding between the parties was actually in respect of 3220 sq. ft. and 3037 sq. ft. He would submit that under the circumstances, there is no question of cancellation, and hence, the cancellation letter has got to be quashed by issuing a writ.

9.Contrary to the above contentions, the learned Senior Counsel appearing for the respondents Railway Company would submit that in the instant case, there was a tender; that the tender documents were purchased by the petitioner; that the terms and conditions stipulated therein, would be binding on both the parties wherein the area has been clearly shown as 573 sq. ft. and 1232 sq. ft. respectively, for which he has also made the security deposits; that those conditions would be binding on him; that at the time when the preliminary plans were filed, the area was shown in excess as 3220 sq. ft. and 3037 sq. ft. for the two locations; that those plans remained not approved; that the first respondent Railway Company also found out the mistake; that the said mistake has crept in at the time of calling of tender; that it emanated from both sides; that once there was a mutual mistake noticed, the tender cannot be acted upon and it has to be necessarily cancelled; and that accordingly, it was cancelled.

10.Added further the learned Senior Counsel that in the instant case, the State is the guardian to protect its property; that even in a case where it would fetch more amount, the tender could be cancelled; that once there was a mutual mistake found, it has been rightly cancelled; and that under the circumstances, the cancellation has got to be affirmed, and the writ petition be dismissed.

11.The Court paid its anxious consideration on the submissions made.

12. Concededly, the petitioner pursuant to the publication made by the first respondent Railway Company in respect of the Cell Kitchens in two locations namely Madurai and Jolarpettai, participated in the tender. It is also not in controversy that it was he who purchased the tender documents from the first respondent, and he also submitted his applications accordingly. The tender documents following the publications made by the first respondent, would clearly reveal that the area covered, is 573 sq. ft. and 1232 sq. ft. only. This was actually the area for which the tender was made, and the petitioner has also participated. Accordingly, he was found to be the successful bidder and was also declared so. Needless to say in a case of tender, when a party has participated in the tender, the terms and conditions found in the tender, would be binding on both the parties. Having applied for and participated in the tender, where the area is shown as 573 sq. ft. and 1232 sq. ft. for those two locations, now the petitioner cannot be permitted to say that though it is found so in those documents, it was actually a different area from the one understood between the parties. Now, at this juncture, it is pertinent to point out that no material is available to show that the area that was understood between the parties for those Cell Kitchens at Madurai and Jolarpettai, were 3220 sq. ft. and 3037 sq. ft. respectively. But, on the contrary, the tender documents, the averments made by the petitioner, the security deposits paid and the concluded tender all would go to show that it was only for 573 sq. ft. and 1232 sq. ft. for Madurai and Jolarpettai respectively. Under the circumstances, the contention put forth by the learned Senior Counsel for the petitioner that there was a consensus ad idem between the parties for the area namely 3220 sq. ft. for Madurai and 3037 sq. ft. for Jolarpettai approximately, cannot be countenanced. If to be accepted, it would be against the agreement between the parties as evident from the materials available.

13. The second circumstance which stands against the petitioner is that after the payment of the tender amounts, etc., the petitioner placed before the authorities the preliminary plans for approval. Those plans when placed before the Railway Company, they were not approved; but, they were returned for certain modifications to be made, along with suggestions. The contention put forth by the learned Senior Counsel for the petitioner is that those plans were returned only for the purpose of certain modifications which were quite technical in character; but, they never spoke about any area in question cannot be accepted. Now, the question would be whether the said plans which were placed, were either accepted or approved by the Railway Company. It is seen that the plans remained not approved. Thus, it would be quite clear that having participated in the tender in respect of the area namely 573 sq. ft. and 1232 sq. ft. for the locations at Madurai and Jolarpettai respectively, the petitioner after the concluded contract placed two plans for approval for excess area of 3220 sq. ft. for Madurai and 3037 sq. ft. for Jolarpettai. Under the circumstances, the plans which were placed by the petitioner, were not only for the excess area but also contrary to the agreement entered into between the parties.

14.As regards the contention put forth by the learned Counsel for the petitioner that these areas of 573 sq. ft. and 1232 sq. ft. would not be sufficient to locate the Cell Kitchens, this Court is of the view that the same cannot be a reason to accept the case of the petitioner. Once the tender documents were applied for and under the concluded contract, security deposit has also been paid, and what is borne by the document is only 573 sq. ft. and 1232 sq. ft. for the two locations and not otherwise, it would be binding upon the parties. Merely because the area that is found in the tender document namely 573 sq. ft. and 1232 sq. ft. for those two locations, would be insufficient to locate the Cell Kitchens, the case of the petitioner cannot be accepted since the same would go against the document itself. Under the circumstances, that contention has got to be rejected.

15.Needless to say that a contract becomes void if the parties have entered into the contract on the mutual mistake of fact. In the case on hand, a reading of the letter of cancellation by the Railway Company would clearly reveal that at the time when the tender was called for, the areas were 573 sq. ft. and 1232 sq. ft. for the two locations, and the amounts were also fixed for those areas only. It is also true that these areas, in the opinion of the Railway Company, would not be sufficient to locate the Cell Kitchens and thus, a mistake has already crept in at the time when the tenders were called for and notification was made. On the basis of such tender, applications were also made by the tenderer namely the petitioner herein, and the Railway Company has also accepted the same. Thus, it is a mutual mistake that has crept in at the initial stage itself. Under the circumstances, the mutual mistake as put forth by the learned Senior Counsel for the respondents, is also found correct. Therefore, the case of the petitioner seeking for a writ cannot be accepted both factually and legally for the reason that he cannot carry a case on merits on the ground that what was actually understood between them was 3220 sq. ft. and 3037 sq. ft. for the two locations when the documents entered into between the parties, would be only for 573 sq. ft. and 1232 sq. ft. Thus, it would be quite clear that the cancellation was made on the strength of the mutual mistake, and also it was a fit case where cancellation had to be done. Hence, the act done by the first respondent Railway Company, was not only reasonable but also justified. Under the circumstances, no interference is called for, and WP No.19521/2007 requires an order of dismissal.

16.In the result, WP No.19521/2007 is dismissed. WP No.18813 of 2007 is dismissed as infructuous. No costs. Consequently, connected MPs are also dismissed.

Sd/  
Asst.Registrar

/true copy/

To:

1.The Indian Railway Catering and  
Tourism Corporation Limited  
(A Government of India Enterprise)  
rep. By Executive Director (CS)  
9<sup>th</sup> Floor, Bank of Baroda Building  
No.16, Parliament Street  
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2.The Regional Director  
Indian Railway Catering and  
Tourism Corporation Ltd.,  
Zonal Office  
6-A, The Rain Tree Place  
No.9, Mc Nichols Road  
Chennai 600 031.

nsv/

+ 2 cc to the M/s. A. L. Gandthimathi, Advocate SR No. 69538, 69539  
+ 1 cc to the Mr. V. G. Suresh Kumar, Advocate SR No. 69584

WP Nos.18813 and  
19521 of 2007

MS (CO)  
SR/6.12.2007



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